



EMPLOYMENT TRIBUNALS

Claimant: Mr Stuart Lowther

Respondent: Mantank Environmental Services Limited

Heard at: Middlesbrough

On: 10 May 2019

Before: Employment Judge A.M.S. Green

Representation

Claimant: In person

Respondent: Mrs J Marley - Solicitor

RESERVED JUDGMENT

1. The Tribunal has jurisdiction to hear the claimant's claim for unpaid holiday pay under regulation 16 of the Working Time Regulations 1998. The Tribunal's jurisdiction is limited to the claim of underpaid holiday pay as set out in the claimant's payslip dated 26 October 2018. The tribunal does not have jurisdiction relating to the claimant's claim for unpaid holiday pay in respect of any payments made prior to 26 October 2018.
2. The claimant's claim for underpayment payment of holiday pay pursuant to regulation 16 of the Working Time Regulations 1998 is dismissed.

REASONS

1. The claimant is claiming unpaid holiday pay for the duration of his employment. He claims that the respondent has not paid him the full amount of his accrued holiday pay and he seeks payment of the shortfall. His claim is under Working Time Regulations 1998 ("WTR"). He has not expressly claimed unlawful deduction from wages under Employment Rights Act 1996 and it is not possible to infer such a claim from the claim form. This is relevant for the purposes of time limits for presenting claims and the availability of any extensions to allow late claims.

2. The claimant presented his claim form to the employment tribunal on 26 February 2019. The ACAS early conciliation certificate is dated 14 February 2019. ACAS received the notification of claim on 14 January 2019.
3. The respondent has resisted the claim for the following reasons:
 - a. His claim is time-barred. He should have presented his claim to the tribunal on or before 27 November 2018. ACAS did not receive his Early Conciliation notification until 14 January 2019.
 - b. If his claim is not time-barred or if time is extended, any holiday payment made to the claimant should be considered under regulation 13 A of WTR. In particular, taking into account payments subject to regulation 13 A, there was an impact on a series of deductions taking place with gaps in less than 3 months between the alleged deductions and, the two-year limitation period for unlawful deductions should apply.
4. The claimant had not prepared a witness statement and had not filed and served a hearing bundle. He provided documents at the hearing (marked "CL 1-CL 3"). Mrs Marley did not object to those documents being accepted into evidence. The claimant and Mr Anthony Gray gave oral evidence in chief and both men were cross examined by Mrs Marley. I asked questions to clarify my understanding in addition to taking the oral evidence in chief from the claimant and Mr Gray. Mrs Marley and the claimant made closing submissions. It was agreed that I would deal with the time bar issue as a preliminary matter and then determine liability. If I found he respondent liable, remedy would be dealt with at a separate hearing.
5. After the hearing I requested the respondent to send in copies of the claimant's payslips for 2018. These were sent in and I have accepted them into evidence.
6. In reaching my decision, I have considered the oral and documentary evidence, my record of proceedings and the parties' submissions. The fact that I have not referred to every document produced to the Tribunal in evidence should not be taken to mean that I have not considered it.
7. The claimant must establish his claim on a balance of probabilities.
8. These are the issues which I must determine:
 - a. Were all the claimant's complaints presented within the time limits set out in regulation 30 (2) WTR? (I.e. three months beginning with the date on which it is alleged that the exercise of the right should have been permitted). If the claimant's complaints were not presented within time, where they presented within such further period as the tribunal considers reasonable if it is satisfied that it was not reasonably practicable for the complaints to be presented before the end of the period of three months?
 - b. To the extent that the Tribunal has jurisdiction, did the Respondent underpay the claimant for taking annual leave under WTR?

9. On considering the evidence, I make the following findings of fact:

- a. The claimant was employed as a drainage engineer by the respondent. He never received written particulars of employment.
- b. On his own oral evidence in chief the claimant accepted normally worked from 7:30 AM to 4 PM. He worked an eight-hour day with a 30-minute break. This was a forty-hour week. He worked five days per week from Monday to Friday. The claimant also worked overtime at the Wilton site. If he worked overtime, he would be paid double time if he worked on a Sunday and time and a half if he worked on a Saturday. If he worked more than his normal eight-hour day, he would be paid overtime at the rate of time and a half. There was no evidence to suggest that overtime was obligatory on both sides (i.e. that the respondent was obliged to provide it and the claimant was obliged to work it). The claimant had normal working hours comprising an eight-hour day for which he was paid £12 per hour. His remuneration did not vary according to the amount of work that he did during those hours. His remuneration did not vary from week to week according to the days or times on at which he was required to work his normal working day.
- c. The claimant's basic rate of pay was £12 per hour. Over time rates varied. If he was paid time and a half, this was £18 per hour. If he was paid double time, this was £24 per hour.
- d. The claimant was entitled to 28 days statutory annual leave. 20 days comprised his basic annual leave entitlement. 8 days comprised his additional annual leave entitlement. The claimant was paid £12 for each hour of holiday that he took.
- e. The claimant believed that he was required to give the respondent four weeks' notice. He claimed that he worked one week and was paid in lieu of the remaining three weeks as shown in his final payslip (64 hours at £12 per hour; totaling £768).
- f. The claimant prepared a list of holiday dates which he had taken (CL 1) from 30 February 2017 until 19 October 2018. In the calendar year for 2018, the claimant took 14 days holiday. He was paid for taking leave in respect of each of those holidays that he took. However, he believed that the respondent had incorrectly calculated the amount that he was due to be paid because it had failed to average his pay over the preceding 12 weeks prior to the date on which he took the holiday.
- g. The claimant took his last holidays on 18 & 19 October 2018. He did not present his claim form to the Tribunal until 26 February 2019. The claimant prepared his claim form himself having taken advice from ACAS prior to preparing the claim form. He did not ask anyone at the respondent about his claim before presenting it to the tribunal. He said that when he first started working for the respondent, he was told that it had opted out of paying average weekly holiday pay. He thought this meant that they were not obliged to pay him on that

basis. ACAS advised him that he would be entitled to be paid holiday pay based on an average week's pay calculated over 12 weeks. He told me that he raised this query with ACAS on 22 October 2018. Mr Gray also helped the claimant to calculate his holiday entitlement using the 12 week averaging formula.

- h. The claimant's last payslip was issued on 7 December 2018. He was paid £672 accrued holiday pay as evidenced by the payslip that he produced to the tribunal. He accepted that his initial claim of £3995.90 unpaid holiday should be reduced by £672. Prior to this, last day on which he was paid for taking holiday was 26 October 2018. He was paid £192 for holiday (i.e. 16 hours holiday). This payment related to holiday that he took on 18 and 19 October 2018. The respondent calculated holiday pay based on his standard rate of pay (i.e. £12 per hour). The respondent did not factor in overtime rates of pay and did apply the 12 week average formula.

10. I now turn to the applicable law as follows:

- a. WTR provides workers with a statutorily guaranteed right to paid holiday. Subject to certain exclusions, all workers are entitled to 5.6 weeks, paid holiday in each leave year beginning on or after 1 April 2009 comprising 4 weeks' basic annual leave under regulation 13 (1) and 1.6 weeks' additional annual leave under regulation 13 A (2). The additional leave entitlement is intended to reflect the number of public holidays in England and Wales. The entitlement of 5.6 weeks' leave is subject to a statutory cap of 28 days.
- b. If an employer denies a worker the entitlement to paid holidays, he or she has the right to complain to an employment tribunal under regulation 30. Regulation 30 (2) of WTR provides that a complaint under regulation 30 must normally be presented to a tribunal within three months beginning with the date on which it is alleged that the payment should have been made. Where it is not reasonably practicable for a complaint to be presented within the period referred to above, the complaint will be admissible provided it was presented within such further period as the Tribunal considers reasonable.
- c. Regulation 16(1) of WTR provides that a worker is entitled to be paid at the rate of a week's in respect of each week of annual leave to which he is entitled under regulation 13 or 13A WTR. A week's pay is calculated in accordance with Employment Rights Act 1996 sections 221-224 ("ERA").
- d. The first step in calculating a week's pay is to ascertain whether the claimant has "normal working hours". It is normally clear what those working hours are but in situations where an employee works overtime, the matter becomes complicated. ERA, section 234 (1) provides that a worker still has normal working hours if he or she is entitled to be paid overtime when he or she works more than a fixed number of hours in a week or other period. The normal working hours in this situation will be the fixed number of hours (ERA, section 234 (2)). If the contract stipulates a fixed or minimum number of hours

that the employee must work that exceeds the number of hours without overtime, then ERA section 234 (3) provides that the number or minimum number of hours shall be taken as the normal working hours even if some of them are paid at an overtime rate. Thus, only overtime that is obligatory on both sides (i.e. the employer is obliged to provide it, and the employee is obliged to work it) constitutes part of the worker's normal working hours. This means that in other cases, overtime is discounted in calculating a week's pay because "normal working hours" are taken to be the fixed hours under the contract.

- e. One question that has arisen is whether ERA, section 234 applies to the calculation of holiday pay under WTR. This is because section 234 is not expressly incorporated into the calculation of a week's pay for the purposes of regulation 16. If it does apply, then a worker with basic contractual hours who regularly works compulsory overtime that is not guaranteed by the employer will only be paid according to his or her basic hours when taking annual leave. In **Bamsey and others v Albon Engineering and Manufacturing plc 2004 ICR 1083** the Court of Appeal held that section 234 is clearly incorporated into regulation 16 WTR even though not expressly provided for on its face.
- f. The method of calculating a week's pay for a worker with normal working hours depends on whether the worker's remuneration varies with the amount of work done or according to the time of the work. In the case of workers who do not have normal working hours, a week's pay is calculated by reference to the worker's average remuneration over the previous 12 weeks. In the case of a worker who:
 - i. has normal working hours;
 - ii. whose remuneration does not vary according to the amount of work done during those hours; and
 - iii. whose remuneration does not vary from week to week according to the days or times on or at which the worker is required to work, a week's pay is the amount payable by the employer under the contract in force on the calculation date if the worker works throughout his or her normal working hours in a week (ERA, section 221 (1). The "calculation date" is the first day of the period of leave the work is taking (regulation 16 (3) (c). In such a situation, credit will not be given for overtime pay.
- g. Where a worker's complaint relates to a failure to pay holiday pay, the Tribunal must order the employer to pay the worker the amount which it finds to be due (regulation 30 (5))

11.I noted the following submissions:

- a. Mrs Marley's position is that the claimant was required to bring his claim within three months of the date of deduction. The claimant did

not bring his claim in time. She calculated that the latest date of underpayment was 28 September 2018. She submits that the claimant's additional regulation 13 A holiday entitlement was covered by the payment in lieu of notice of holidays set out in the 7 December 2018 payslip. She maintains that this covers seven days of holiday. The 26 October 2018 payslip covered the holidays taken by the claimant on 18 and 19 October 2018 which were not regulation 13 WTR holidays where there is a requirement to establish normal weekly pay using the 12-week average calculation.

- b. The claimant's position is that he last received holiday pay in his 7 December 2018 payslip, and he believed that time for presenting his claim started to run from when he contacted ACAS. He also claimed to have contacted the respondent about the matter 29 December 2018 but had not received a reply.
12. As the claimant is not contesting the holiday pay that he received in his payslip for 7 December 2018, the claimant should have presented his claim to the Tribunal on or before 25 January 2019 (i.e. 3 months from the date that his last contested holiday pay was made – 26 October 2018). There was a period of Early Conciliation. ACAS received notification of the claim on 14 January 2019 and issued its certificate on 14 February 2019. This would have extended the time limit for the claimant to issue his claim until 14 March 2019. Therefore, the claim relating to underpayment of holiday pay in respect of the payslip dated 26 October 2018 was presented in time and the tribunal has jurisdiction to hear that claim.
13. The claimant is claiming holiday pay for 2018 and 2017 (excluding the payment made on 7 December 2018). Does the Tribunal have jurisdiction to hear any claims for unpaid holiday pay prior to the 26 October 2018 payslip? The payslip prior to 26 October 2018 where holiday pay was paid is dated 28 September 2018. The claimant was paid £96. He would have needed to have presented his claim on or before 27 December 2018. He cannot rely on any extension of time under the ACAS Early Conciliation scheme because he only notified ACAS of his claim on 14 January 2019 (i.e. after time had already expired). The same must, therefore, apply to all the earlier claims that he has made for holiday pay. As he has not claimed unlawful deduction from wages under ERA section 13, he cannot claim that the payslips relied on cover a series of deductions such that the three-month time limit runs from the date the last deduction was made (ERA, section 23(3)). Even if such a claim as made and the Tribunal had jurisdiction it would still fail for the reasons set out below.
14. The claimant has not shown any good reason why it was not reasonably practicable to present his earlier claims (i.e. those that pre-date the 26 October 2018 payslip). He took advice from ACAS on 22 October 2018 to the effect that he had been underpaid holiday pay. He had ample opportunity to present his claim within time. It was reasonably practicable for the claimant to issue his claim in respect of the earlier payslips. Furthermore, Mr Gray also assisted him. I do not think he can rely upon ignorance or lack of advice in support of any claim arising from payslips predating 26 October 2018. Consequently, the Tribunal does not have jurisdiction to hear the earlier claims that pre-date the 26 October 2018 payslip. Furthermore, it should not be forgotten that there may have been

time bar issues in relation to those earlier payslips given the period which he is claiming for unless he had asserted unlawful deduction from wages under ERA.

15. The claimant's claim for underpayment of holiday pay insofar as this Tribunal has jurisdiction proceeds on the following premises:

- a. He did not have normal working hours. Although he worked a basic eight-hour day, five days a week, he also worked overtime which varied from week to week.
- b. His overtime should count towards in calculating his normal working hours.
- c. His average weekly pay should be calculated to include both his normal £12 per hour and the overtime rates of £18 per hour and £24 per hour averaged out over the previous 12 weeks from the calculation date.

16. I disagree with the claimant's analysis of his claim for the following reasons:

- a. Although he worked overtime, there was no evidence to show that it was obligatory. Consequently, any overtime that he worked cannot be included in the assessment of his normal working hours.
- b. He had normal working hours. He worked an eight-hour day, Monday to Friday. He was paid £12 per hour for this work.
- c. The respondent correctly calculated holiday pay based on a normal working week of five days where the claimant worked eight hours per day. The respondent correctly applied £12 per hour as the rate to be paid. There was no requirement for the respondent to calculate weekly pay using the 12-week averaging formula.
- d. The respondent paid the claimant the correct amount for the holidays that he took on 18 & 19 October 2018.

For these reasons, the claimant's claim to be underpaid holiday pay must fail and his claim is dismissed.

Employment Judge A.M.S. Green

Date 24 May 2019